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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1972

No. ~~72-891~~

ANNA MAE BRYANT, Administratrix, Etc., Et Al. - - - - - - - - - Petitioners

versus

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA;
DISTRICT No. 23, UNITED MINE WORKERS OF AMERICA;
W. A. BOYLE, President of International Union, United Mine Workers of America - Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUBJECT INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement	3– 6
Reasons For Granting the Writ	6–10
Conclusion	10–11
Appendix "A"—Opinion, Order and Judgment of the District Court	13–17
Appendix "B"—Opinion of the United States Court of Appeals for the Sixth Circuit	18–26

TABLE OF CITATIONS

Cases Cited

	PAGE
Horn Transfer Lines, Inc. v. Morgan, Ky., 398 S. W. 2d 234	8
Marranzano v. Riggs Nat. Bank of Washington, D.C., 184 F. 2d 349	9
Piercy v. Louisville & N. Ry. Co., 198 Ky. 477, 248 S. W. 1042, 1045	8
Smith v. Evening News Asso., 371 U. S. 195, 9 L. Ed. 2d 246, 83 S. Ct. 267 (1962)	8

Textbooks

48 Am. Jur. 2d, Labor and Labor Relations, Sec. 1298	8
2 Harper and James, The Law of Torts, p. 1053, § 18.6	10

IN THE

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No. _____

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v.

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA;
DISTRICT NO. 23, UNITED MINE WORKERS OF AMERICA;
W. A. BOYLE, President of International Union, United Mine Workers of America - - - - - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Anna Mae Bryant, Administratrix of the Estate of James McKinley Bryant, deceased; June Creekmore, Administratrix of the Estate of Paul Creekmore, deceased; Gladys L. English, Administratrix of the Estate of Bobby Gene English, deceased; Lola Belle Epley, Administratrix of the Estate of Frankie (Frank) Epley, deceased; Ruby Nell Harris, Administratrix of the Estate of James Gerald Harris, deceased; Verna Jean Miller, Administratrix of the

Estate of Ernest Miller, deceased; Alvin L. Saling, Administrator of the Estate of Dennie Lee Saling, deceased; and Della Sue Rice, Administratrix of the Estate of Will Rice, deceased, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on September 26, 1972.

OPINIONS BELOW

The opinion and order of the District Court is unreported and is printed in the Appendix "A" hereto.

The opinion of the Sixth Circuit Court of Appeals is unreported and is printed in Appendix "B" hereto.

JURISDICTION

The United States District Court for the Western District of Kentucky entered judgment on a motion for summary judgment for the defendants in an action based on violation of The Labor Management Relations Act (Appendix "A"). Petitioners' appeal to the Sixth Circuit Court of Appeals was denied and judgment was entered on September 26, 1972 (Appendix "B"). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a labor union can be liable for wrongful death of a member as a result of negligent performance of its obligation to enforce a union contract.

STATEMENT

All eight of petitioners' decedents were killed as a result of a coal mine explosion that occurred on August 7, 1968 at the River Queen Underground Mine of the Peabody Coal Company in Muhlenberg County, Kentucky. The men were all members of the defendant Union Local No. 1508. It was necessary that they belong to the Union in order to work in the mine. Under the operational setup of the Union at that time, Local Union No. 1508 was under the jurisdiction of District No. 23, United Mine Workers of America which was immediately under the International Union of the United Mine Workers of America. Members of the Executive Board of the International Union and the officers of District No. 23 were appointed by the International President and the International and District No. 23 had complete dictatorial powers, so to speak, over the Local and the Union membership. The International Union, the President of the International, W. A. Boyle, and District No. 23 of the Union were made parties defendant to this lawsuit.

The Union (The United Mine Workers) had negotiated a contract which adopted the Federal Mine Safety Code "as a code for health and safety in Bituminous and Lignite Mines" (Exhibit 1, docket entry 45). It is true that in addition to this statement there is contained in the Union contract a provision labeled "enforcement"; however, these provisions did not eliminate the overall obligation of the Union to enforce the Federal Mine Safety Code as a standard of safety

for the operation of the mine. Indeed the record will reveal that the Executive Board of the International Union recognized this obligation and adopted a resolution in 1956 which provided as follows:

> "79. Was the resolution adopted by the International Executive Board in 1956 which provided as follows:
>
> " 'Each district representative shall know the Federal Mine Safety Code and be made fully responsible for compliance with its various provisions by the various miners within his assigned jurisdiction. He will consider code compliance equal in magnitude with his other assignments, and will diligently strive to influence the responsible officials at the mine property to eliminate code violations, particularly those which have existed during consecutive federal inspections, and have been designated as repeat violations.'
>
> "in effect on August 7, 1968?
>
> "A. Yes.
>
> "79a. Did it apply to District 23, United Mine Workers of America?
>
> "A. Yes, it applied to District 23 representatives." (Docket Entry 48, p. 24)

Of course, this resolution does not become a part of the contract but it is *evidence* of the interpretation the Union placed on the contract insofar as the Union's rights to enforce the Federal Mine Safety Code was concerned. This provision was brought out in the answer to an interrogatory (Interrogatory No. 79 and its answer appearing in Docket Entry 48, p. 24).

The Union had never attempted to inform its membership or even the President of Local 1508 as to the provisions of the Federal Mine Safety Code (Docket Entry 69, p. 122). The petitioners take the position that this, among other things, was evidence of the negligent failure on the part of the Union to enforce the provisions of the contract. By evidence in the record (admittedly in conflict) it was common knowledge among the men that it was standard practice to haul explosives on the drills which were used to drill the seams of coal. This was found to be the cause of the explosion which killed the men. This practice was also forbidden by the Federal Mine Safety Code.

The trial court had before it depositions, interrogatories and their answers, and affidavits filed by the parties, including the Federal Mine Safety Code and the Union constitution, as exhibits. The United States District Judge granted summary judgment to the Union and this action was affirmed by the United States Court of Appeals for the Sixth Circuit. Both Courts held that there was nothing in the language of the contract that *required* the Union to exercise the power. The Court of Appeals admitted:

> "Of course the Union is not without responsibility toward its members with regard to the safety program. Quite apart from obligations created directly by the collective bargaining agreement itself any exclusive bargaining representative has a duty to fairly represent the members of its bargaining unit. This duty includes the obligation to enforce fairly the provisions of any collective bargaining agreement." (Appendix "B", p. 24)

In spite of this accurate statement of the law, the Court held that summary judgment should be awarded against the petitioners.

REASONS FOR GRANTING THE WRIT

After reading the plan mandate of Rule 56 of the Federal Rules of Civil Procedure, it would seem trite to cite authority for the fact that all reasonable inferences should be interpreted in favor of these petitioners on the motion for summary judgment. However, an examination of both the opinion of the United States District Court and the Court of Appeals will reveal that these inferences were interpreted in favor of the Union, the movant. For example, the Court of Appeals stated that petitioners failed ". . . even to show that Union officials had any knowledge of any Code violation at all." (Appendix "B", p. 24) even though the evidence showed that the Union had, by its resolution, quoted above, acknowledged its responsibility for enforcement of the provisions of the Federal Mine Safety Code and even though it was common knowledge in the mine that these provisions were not being followed. If the Union had the responsibility, would this not include the duty to inquire? The Court of Appeals in effect is saying that even though the United Mine Workers International and District, in this instance, had complete dominance over its membership, they could avoid their responsibility by simply closing their eyes and saying that they did not know that there was a violation. With such power should come the duty to inspect, the duty to inquire and the duty to at least make

a reasonable effort to determine whether the provisions of the Code were being followed or not by the signatory companies.

Contrary to the statement made in the opinion of the Sixth Circuit Court of Appeals that they would not consider the resolution quoted above, it is believed that the plain commandment of Civil Rule 56 is that the Court consider *all the evidence before it,* not just that which may or may not have been mentioned by counsel in an argument. Such a rule as indicated by the Court of Appeals would require counsel to point out every shred of evidence that was already in the record. Indeed the tempers of the trial courts would make this almost an impossibility for counsel for a party. We recognize the obligation of counsel to raise any issue of law, but we are aware of no rule that requires the lawyer to specifically point out items of evidence to a trial judge who is hearing the matter on his own, such as a summary judgment hearing. Counsel would very quickly be told that the judge could read and that he had examined the record and he did not need a minute re-reading of that record to him to arrive at a decision.

It will also appear in the record that Peabody (the mine owner and operator) admitted that it was a joint undertaking of the Union and Peabody to acquaint underground mine employees with the Wage Agreement, Federal Mine Safety Code, and State laws (Docket Entry 44, p. 22). Peabody further states that to their knowledge the Union did not carry out any type of safety training (Docket Entry 44, p. 7).

As was stated in *Piercy* v. *Louisville & N. Ry. Co.*, 198 Ky. 477, 248 S. W. 1042, 1045:

> "The primary purpose in the organization of labor unions and kindred organizations *is to protect their individual members* and to secure for them a fair and just remuneration (sic) for their labor *and favorable conditions under which to perform it.* Their agreements with employers look always to the securing of some right or privilege for their individual members, and the right or privilege so secured by agreement is the individual right of the individual member, and such organization can no more by its arbitrary act deprive that individual member of his right so secured than can any other person." (Emphasis added)

While the above is an old Kentucky case, the Labor Management Relations Act, Sec. 301, has been construed to confer upon individuals the right to bring suits for their damages that they have suffered by reason of violation of the contract. 48 Am. Jur. 2d, Labor and Labor Relations, Sec. 1298. The Supreme Court in the case of *Smith* v. *Evening News Asso.*, 371 U. S. 195, 9 L. Ed. 2d 246, 83 S. Ct. 267 (1962), held that an individual employee is not prevented from bringing suit for breach of his contract and employees in such situations are the third party beneficiaries under the contract. This is also the law in Kentucky. *Horn Transfer Lines, Inc.* v. *Morgan*, Ky., 398 S. W. 2d 234.

The United States District Court could not find a ground for awarding damages. The Court of Appeals felt that the District Court was right. In this connec-

tion see *Marranzano* v. *Riggs Nat. Bank of Washington*, D.C., 184 F. 2d 349, 350, wherein the court stated:

> "The right of the party to a contract to sue when damaged by the other party's violation of it does not depend upon the grant of such right by the terms of the contract itself. So the fact that 'This Agreement as drawn grants no right of suit' does not prevent appellant from maintaining this action. The question is, does the appellant fall within any exception to the general rule that a stranger to a contract may not sue to enforce its terms or to recover damages for a violation thereof?"

In *Marranzano* the plaintiff filed a suit as the beneficial member of the union against a newspaper publisher for wrongful discharge. The district judge dismissed the complaint on the grounds that the individual member of the union could not sue for damages because of the breach of the collective bargaining agreement and stated that the agreement as drawn "grants no right of suit." The appellate court held that the plaintiff had a right to try to protect her job and to bring suit in order to do so.

Since the right of one to sue on a contract when damaged by a party's violation of that contract is not dependent upon the terms of the contract itself, it would be a peculiar quirk of the law to deny these plaintiffs a right of action against the Union which has deprived the beneficiaries under the contract of their rights, their safety and their lives through the negligence of the Union.

In the case at bar the Union had the obligation to enforce the provisions of the contract for the benefit of

its membership and this was to see that the standard of the Federal Mine Safety Code was used. As stated in 2 Harper and James, The Law of Torts, p. 1053, § 18.6:

> "In sum, then, liability for negligent nonperformance of contract should be imposed where injury to plaintiff (over and above the mere withholding of performance) is foreseeable and (1) where there is foreseeable and reasonable reliance on the undertaking which has been a cause in fact of the injury, or (2) where the contract is an incident to an enterprise of the defendant and there are adequate reasons from policy for imposing a duty of care to avoid the risk thus encountered, as an incident to the enterprise."

It should be pointed out again to the Court that these union members were paying dues each month to the defendant Union which automatically owed them a duty not only to bargain in good faith for them but to make reasonable efforts to enforce the provisions of their contract. This is an obligation under the Labor Management Relations Act (29 U.S.C.A. § 185) and in the case at bar is an obligation by reason of the contract itself.

CONCLUSION

The opinion of the Court of Appeals (Appendix "B") stated:

> "To saddle labor unions with liability for the mine operators' failure to comply with standards introduced into the contract at the union's bidding would simply be to discourage the inclusion of similar or more effective standards in later con-

tracts. Such result would not serve the interest of miners and would retard rather than advance the goals of the National Labor policy." (Appendix "B", p. 25)

Certainly it would not seem that the Union should enjoy some type of special privilege in the law of this country where it would not be responsible to the very people for whom they hold a trust. What could be more important to the working man than safety and his life? If the Union member is to have no rights, of what value is ". . . the inclusion of similar or more effective standards in later contracts."? Indeed why put them in contracts at all?

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel for Della Sue Rice

CERTIFICATE OF SERVICE

I, Charles A. Williams, counsel for petitioners herein, do hereby certify that I served a true copy of the foregoing petition (with Appendix) for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit on the respondent on December 15, 1972, by depositing same in a United States mailbox, with first class air mail postage pre-paid, addressed to Edward L. Carey, Attorney at Law, 900 Fifteenth Street, N.W., Washington, D.C. 20005; Harrison Combs, Attorney at Law, 900 Fifteenth Street, N.W., Washington, D.C. 20005; Grant F. Knuckles, Attorney at Law, Asher Building, Pineville, Kentucky 40977; and Albert W. Spenard, Attorney at Law, P. O. Box 142, Madisonville, Kentucky 42431, counsel of record for the respondents.

Charles A. Williams

CHARLES A. WILLIAMS

APPENDIX "A"

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

ANNA MAE BRYANT, Administratrix of the Estate of JAMES MCKINLEY BRYANT, Deceased, et al,
Plaintiffs,
v.
INTERNATIONAL UNION, et al,
Defendants.
Civil Action No. 2394

DELLA SUE RICE, Administratrix of the Estate of WILL RICE, Deceased,
Plaintiff,
v.
INTERNATIONAL UNION, et al,
Defendants.
Civil Action No. 2395

OPINION, ORDER AND JUDGMENT

This matter comes before the Court on the motion of defendants, International Union, United Mine Workers of America, and District 23, United Mine Workers of America (hereinafter "Union"), and on the motion of defendant, Peabody Coal Company, Inc. (hereinafter "Peabody"), for summary judgment under the provisions of Rule 56 of the

Federal Rules of Civil Procedure. Having heard lengthy oral argument by counsel for all parties, as scheduled, on September 30, 1971, and having studied and considered the briefs submitted by counsel for all parties, the Court is of the opinion the motions of defendants should be sustained.

The pleadings, depositions, answers to interrogatories, and affidavits and other material filed in support of the motions for summary judgment show that, at all times material herein, Peabody owned and operated a coal mine in Muhlenberg County, Kentucky known as the River Queen Underground Mine No. 1. The plaintiffs' decedents were members of the Union and employees of Peabody at this mine. Both Peabody and the Union had for many years been parties to a collective bargaining agreement known as the National Bituminous Coal Wage Agreement of 1950, as amended, which covered the operations at River Queen Mine. An explosion occurred in the mine on August 7, 1968 which resulted in the deaths of the plaintiffs' decedents while they were at work in the mine. The plaintiffs have based their claims of liability against the defendants on an alleged breach by both Peabody and the Union of the safety provisions contained in the agreement.*

The labor contract contains a "Mine Safety Program" under which the Federal Mine Safety Code is adopted and incorporated by reference as a standard for the industry. Compliance with the terms of the Code is provided for through reports and recommendations of Federal coal mine inspectors and a Mine Safety Committee selected by the local union at each mine. The prime objective of the Mine Safety Program, as stated, appears to be compliance and, under certain conditions, a mine or part of a mine may be closed down for failure to comply. We find nothing in the Mine Safety Program which could be interpreted as grant-

*By amended complaint, the plaintiffs have also alleged violation by the defendants of the Civil Rights Act, 42 U.S.C. § 1983 and § 1985(3), but this theory has not been seriously argued.

ing to employees monetary or financial benefits not previously enjoyed.

Insofar as a maintainable action against Peabody is concerned, the record shows, as stated above, that all of plaintiffs' decedents were employees of Peabody, that Peabody and all of the deceased employees had elected to and were operating under the provisions of the Workmen's Compensation Act of Kentucky, and that the accident causing the death of plaintiffs' decedents arose out of and in the course of the employment. It further appears that the Workmen's Compensation Board of Kentucky took jurisdiction of the claims and that the plaintiffs sought and are in the process of obtaining all benefits provided by the Kentucky Act. KRS 342.015(1), which is a part of the Act, provides that the remedy set out therein is exclusive and that the employer shall be released from all other liability except in certain instances not involved here. *Greene* v. *Caldwell*, 170 Ky. 571, 186 S. W. 648 (1916); *Thomas* v. *Crummies Creek Coal Co.*, 297 Ky. 210, 179 S. W. 2d 882 (1944); *Davis* v. *Solomon*, Ky., 276 S. W. 2d 674 (1955); *Miller* v. *Scott*, Ky., 339 S. W. 2d 941 (1960).

The Court is of the opinion that the exclusive remedy provided in the Workmen's Compensation Act is dispositive of the claims against Peabody unless the liability of the Company has been enlarged under and by virtue of the terms of the applicable collective bargaining agreement between Peabody and the Union. Indeed, counsel for plaintiffs concedes there is no maintainable action against Peabody unless the genesis for such can be found in the collective bargaining agreement. It is the Court's feeling that the contract must be construed as a whole and that the intent of the signatory parties must be inquired into. *Upholsterers' International Union of North America, AFL-CIO* v. *American Pad & Textile Co.*, 372 F. 2d 427 (6th Cir. 1967); *Communication Workers of America, AFL-CIO* v.

General Telephone Company of Kentucky, 236 F. Supp. 588 (E.D. Ky. 1964).

With the above premises in mind, the Court has examined the entire contract and, as stated, finds nothing in it which would enlarge the monetary liability of Peabody to employees injured or killed in the course of their employment. It is specifically set out in the agreement that Peabody ". . . will provide the protection and coverage of the benefits under Workmen's Compensation and Occupational Disease Laws, whether compulsory or elective, existing in the states in which the respective employees are employed." We are unable to read into the agreement an intent by the parties to create a liability above and beyond the remedy provided by the compensation statute. We are fortified in this opinion by the fact that the Federal Coal Mine Safety Act, under which the Federal Mine Safety Code was promulgated, expressly provides that such Act and Code shall not supersede or affect the workmen's compensation law of any state. 30 U.S.C. § 481(c).* Accordingly, the Court is forced to the conclusion, and so finds, that the collective bargaining agreement does not evidence an intent of the signatory parties to enlarge the employer's monetary liability for injury to or death to an employee beyond that provided by the workmen's compensation law.

The Court is aware of the fact that collective bargaining agreements may, and frequently do, contain provisions for the imposition of liability upon an employer for financial benefits to employees in addition to those provided by state compensation statutes. Where this occurs, however, the specific benefits are set out and definite limitations are established. See *Nelson* v. *Victory Electric Works, Inc.*, 227 F. Supp. 404 (D.C. Md. 1964), aff'd. 338 F. 2d 944

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*As stated, the Federal Mine Safety Code for Bituminous Coal and Lignite Mines is incorporated into the collective bargaining agreement herein as the basis of the Mine Safety Program.

(4th Cir. 1964). The Union's Welfare and Retirement Fund provides a well known example of this in the coal industry.

It is axiomatic in the law that for every liability there must be a correlative or reciprocal duty. As indicated above, the Court is unable to find a duty owed by either Peabody or the Union to the plaintiffs in excess of the remedy provided by the workmen's compensation law. The Court is unable to find that the parties to the collective bargaining agreement intended or expressed a contractual duty in this respect.

The Court concludes that whatever caused and brought about the tragic accident on which these claims are based occurred in the course and scope of the employment of plaintiffs' decedents by Peabody, that said accident arose out of the employment, that the Workmen's Compensation Act of Kentucky is applicable, and that the remedy provided therein is exclusive.

Nor does the Court find any maintainable cause of action under the Civil Rights Act, 42 U.S.C. § 1983 and § 1985(3). There is no allegation or indication in the record of discrimination against a class or group of persons, and, of equal importance, there is no allegation or indication of state or governmental action. We are unable to find that either the Union or Peabody was motivated by any animus against any group or class.

Accordingly, it is hereby ordered that the motion of defendants, International Union, United Mine Workers of America, and District 23, United Mine Workers of America, and the motion of the defendant, Peabody Coal Company, Inc., for summary judgment be and the same are hereby sustained and it is, accordingly, now ORDERED AND ADJUDGED that the claims asserted by the plaintiffs in these actions be and the same are hereby dismissed with prejudice.

This 7th day of January, 1972.

(s) JAMES F. GORDON
United States District Judge

APPENDIX "B"

Nos. 72-1075 & 72-1153

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

72-1075

ANNA MAE BRYANT, ETC., ET AL., *Appellants,*

v.

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL., - - *Appellees.*

72-1153

DELLA SUE RICE, ETC., *Appellant,*

v.

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL., - - *Appellees.*

APPEALS from the United States District Court for the Western District of Kentucky.

OPINION—Decided and Filed September 26, 1972.

Before: PHILLIPS, Chief Judge, CELEBREZZE and KENT, Circuit Judges.

CELEBREZZE, Circuit Judge. On August 8, 1968 an explosion rocked the Peabody Coal Company's River Queen

Mine #1 in Muhlenberg County, Kentucky, killing nine miners. The explosion which took the lives of those men also precipitated a number of lawsuits; these appeals grow out of two of these suits.

After initiating procedures for such recovery as is permitted under Kentucky's Workmen's Compensation law, the representatives of the estates of eight of the dead miners brought actions in the United States District Court against both the Peabody Coal Company and the International Union, United Mine Workers of America. Plaintiffs' complaints pointed out that the Coal Company and the Union had signed a collective bargaining agreement in which they incorporated a document known as the Federal Mine Safety Code. That Code set down minimum health and safety standards for mines and was designed for the use of federal inspectors during their observations of coal mines. Plaintiffs' complaints contended that the Company obligated itself to conform to the Code's standards and that the Union undertook a duty to enfore such compliance. It was further asserted that both the Company and the Union failed to perform their respective duties, leading to the foreseeable result that plaintiffs' decedents, beneficiaries of the contract, were killed as a consequence of practices which were in violation of the Code.

The District Court rejected plaintiffs' claims and granted summary judgment in favor of both the Coal Company and the Union. Plaintiffs have accepted the District Court's decision with respect to the Coal Company and on appeal contest only that part of the District Court's judgment as denied them relief against the Union.

Appellants assert that theirs is an action grounded in § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, that is an action designed to remedy a breach of a collective bargaining agreement. Language in their complaint suggests, however, that this may also be viewed as a suit seeking recompense for the Union's breach of its duty

of fair representation. *See* Goldberg, J. concurring in *Humphrey* v. *Moore*, 375 U. S. 335, 351 (1964). We do not believe that either of these claims can withstand close scrutiny.[1]

When examined with care it is clear that neither the collective bargaining agreement in general[2] nor the "Safety Program" section specifically relied upon by appellants created any duties, breach of which could give rise to liability of the sort appellants seek to fasten upon the Union. The text of the safety program section is set out in full in the margin.[3] We need comment on only two aspects of that pro-

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[1]It is somewhat problematic whether appellants have the standing to bring this suit. While the Supreme Court has clearly established the right of individual employees to sue to enforce certain particularized rights granted them under collective bargaining agreements, it has indicated that not all rights created or duties assumed under a collective bargaining agreement may be subject to enforcement through a suit by an individual under § 301. See *Smith* v. *Evening News*, 371 U. S. 195, 200-201; cf. *Brown* v. *Sterling Aluminum Products Corporation*, 365 F. 2d 651, 657 (8th Cir. 1966) *cert. den.* 386 U. S. 957, *reh. den.* 386 U. S. 1027. Whether standing exists in a particular case turns upon the nature of the right or duty which the individual seeks to enforce. See *Smith*, *supra* 371 U. S. at 201 n. 9; *Brown* v. *Sterling Aluminum Products Corp.*, *supra*. When, as here, the asserted right and/or duty is completely illusory, resolution of the standing problem is extremely difficult. Further this case comes to us in an unusual stance with only the Union surviving as defendant. In view of these circumstances, rather than add to the muddle which surrounds the standing question, see *Falsetti* v. *Local Union #2026, U.M.W.*, 335 F. 2d 658, 660-661 (3d Cir. 1966) we have refrained from passing on this issue which was not raised by the parties. We assume without deciding that, for the purposes of this decision only, the requisite standing can be said to exist.

[2]The Agreement is formally known as the "National Bituminous Coal Wage Agreement of 1950 as Amended Effective April 1, 1966."

[3]"National Bituminous Coal Wage Agreement of 1950 as amended September 29, 1952," the "National Bituminous Coal Wage Agreement of 1950," and all previous Agreements, as therein provided, such amendments, modifications and supplements being as follows, to wit:

(Footnote continued on following page)

MINE SAFETY PROGRAM

Amend the "MINE SAFETY PROGRAM" section of the Agreement by striking out all of the language and inserting in lieu thereof the following:

"(a) **Mine Safety Code**

"The Federal Mine Safety Codes for Bituminous Coal and Lignite Mines of the United States, Part I—underground mines and Part II—strip mines, promulgated and approved October 8, 1953, by the Secretary of the Interior are hereby adopted and incorporated by reference in this contract as a code for health and safety in bituminous and lignite mines of the parties of the first part.

"(b) **Enforcement**

"(1) Reports of the federal coal mine inspectors: Whenever inspectors of the United States Bureau of Mines, in making their inspections in accordance with authority as provided in Public Law 49 and Public Law 552 find there are violations of the Federal Mine Safety Code and make recommendations for the elimination of such noncompliance, the operators shall promptly comply with such recommendations, except as modified in paragraph two of this subsection.

"(2) Whenever either party to the contract feel that compliance with recommendations of the federal mine inspectors as provided above would cause irreparable damage or great injustice, they may appeal such recommendation to the Joint Industry Safety Committee as hereinafter provided.

"(c) **Review and Revision**

"In order to carry out the intent and purposes of the agreement affecting the Federal Mine Safety Code it is agreed that representatives of the United Mine Workers of America and the coal operators signatory hereto shall hold joint consultations with the United States Bureau of Mines looking toward review and appropriate revision of the Federal Mine Safety Code. Any revised code that is agreed upon between the aforementioned parties, when adopted by the parties, shall be adopted and incorporated by reference into this Agreement in place of the code adopted and incorporated in the National Bituminous Coal Wage Agreement of 1950 and continued under this agreement.

"(d) **Joint Industry Safety Committee**

"There is hereby established under this agreement a Joint Industry Safety Committee composed of four members, two of whom will be appointed by the Mine Workers and two of whom will be appointed by the operators, whose duty it shall be to (1) arbitrate any appeal which is filed with it by any operator or any mine worker

(Footnote continued on following page)

gram: The general provisions relating to code compliance [sub-sections (a) and (b)] and the authorization for mine inspections contained in sub-section (e). In examining these sections it must be remembered that the substantive law to be applied is federal in nature, derived from the

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who feels that any reported violations of the code and recommendation of compliance by a federal coal mine inspector has not been justly reported or that the action required of him to correct the violation would subject him to irreparable damage or great injustice; and (2) to consult with the United States Bureau of Mines in accordance with the provisions of Section (e) above.

"(e) **Mine Safety Committee**

"At each mine there shall be a mine safety committee selected by the local union. The committee members while engaged in the performance of their duties, with the following exception, shall be paid by the local union. When the mine safety committee is making an investigation of an explosion and/or a disaster, they shall be paid by the company at their regular rate of pay for the hours spent making such investigation, provided there is not more favorable local agreement or practice already in effect. The committee at all times shall be deemed to be acting within the scope of their employment in the mine within the meaning of the Workmen's Compensation law of the state where such duties are performed.

"The mine safety committee may inspect any mine development or equipment used in producing coal. If the committee believes conditions found endanger the life and bodies of the mine workers, it shall report its finding and recommendations to the management. In those special instances where the committee believes an immediate danger exists and the committee recommends that the management remove all mine workers from the unsafe area, the operator is required to follow the recommendation of the committee.

"If the safety committee in closing down an unsafe area acts arbitrarily and capriciously, members of such committee may be removed from the committee. Grievances that may arise as a result of a request for removal of a member of the safety committee under this section shall be handled in accordance with the provisions providing for settlement of disputes.

"The safety committee and operators shall maintain such records concerning inspections, findings, recommendations, and actions relating to this provision of the agreement as may be required, and copies of all reports made by the safety committee shall be filed with the operators.

"(f) The International Union, United Mine Workers of America, may designate memorial periods not exceeding a total of ten (10) days during the term of this agreement, provided it shall give proper notice to each district."

policy of the national labor laws. *See Textile Workers Union of America* v. *Lincoln Mills of Alabama,* 353 U. S. 448 (1957). So far as possible the courts must seek to advance, not retard those national labor policies in construing the collective bargaining agreements which come before them.

Sub-section (a) of the Safety Program adopts by reference the Federal Mine Safety Code as part of the collective bargaining Agreement. The Code, promulgated by the Secretary of the Interior in 1953, provides minimal safety standards for the guidance of federal mine inspectors. Subsection (b) is labeled "Enforcement" and sets forth the manner in which the Code may be enforced under the Agreement. It limits such enforcement to situations where a violation of the Code has been found by a federal mine inspector and the inspector has issued recommendations for curing the violations. In such cases the mine operator is bound to comply with the recommendations promptly. Presumably in the event of non-compliance the Union could process the matter through normal gievance procedures. No federal inspector's report of violations or recommendations was offered into evidence below nor is there any suggestion that such report existed. Thus the prerequisite to the assumption of any possible enforcement obligation under the contract was lacking in this case.

Further, we are far from convinced that the contract necessarily makes the Union financially responsible for a failure to compel correction of Code violations even in situations where such violations *have been reported* by federal mine inspectors. Sub-sections (a) and (b) read together give the Union the power to compel compliance; nothing in the language of those sub-sections seems to require the Union to exercise such power. Collective bargaining agreements are literally agreements between unions and employers; the Union negotiators are intent on gaining the maximum power possible from management negotiators.

Whether or not they choose to exercise all the power gained depends on a variety of situations relating to the overall employment situation in the industry. It would be a mistake of vast proportion to read every power granted the union by management as creating a corollary contract right in the employee as against the union. Such interpretation of collective bargaining agreements would simply deter unions from engaging in the unfettered give and take negotiation which lies at the heart of the collective bargaining agreement.

Of course, the Union is not without responsibility toward its members with regard to the safety program. Quite apart from obligations created directly by the collective bargaining agreement itself any exclusive bargaining representative has a duty to fairly represent the members of its bargaining unit. This duty includes the obligation to enforce fairly the provisions of any collective bargaining agreement. *See Humphrey* v. *Moore*, 375 U. S. 335 (1964); *Vaca* v. *Sipes*, 386 U. S. 171 (1967). Such duty is breached when the Union in bad faith acts or fails to act for reasons which are arbitrary or discriminatory. *See Humphrey* v. *Moore*, *Vaca* v. *Sipes*, *supra*. While it was alleged that the United Mine Workers failed to enforce compliance with safety rules because of a conspiracy with the River Queen's operator the evidence introduced below showed no sign whatever of such conspiracy and failed even to show that Union officials had any knowledge of any Code violation at all. Under such circumstance there can be no basis for a finding that the Union breached its duty of fair representation.

In addition to their main argument directed toward the nonenforcement of the Safety Code itself appellants also assert that the Union breached its obligations under the collective bargaining agreement by failing to make periodic inspections of the mine. It is asserted that such inspection

obligation was created by the terms of sub-section (e) of the Safety Program section.

There can be no doubt that sub-section (e) does provide for a union role in dealing with safety at the mine. It indicates that a mine safety committee shall be established at each mine with members selected from among the ranks of the union local representing a particular facility.[4] Such committee was established and functioning at the River Queen Mine. The sub-section also provides that among other powers the committee "may inspect any mine development or equipment. . . ." It is apparently contended that this language places a duty to inspect upon the local and International Unions. We do not accept this contention. The use of the permissive "may" rather than obligatory language in the clause clearly negatives the possibility that any duty was to be created. No liability can be predicated upon the language of sub-section (e).

This Court is not unfamiliar with the difficult and long-standing problem of ensuring safety in the coal mines of this country. We recognize the harsh plight of those who have lost the family bread-winner through the all too frequent intervention of mining disaster. The answer to their problem is not to pervert the collective bargaining process by reading into its instruments a liability which was never contemplated and duties which were never assumed in fact or in theory. To saddle labor unions with liability for the mine operators' failure to comply with standards introduced into the contract at the union's bidding would simply be to discourage the inclusion of similar or more effective standards in later contracts. Such result would not serve the

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[4]The International Union suggests that sub-section (e) is completely irrevelant to it because the sub-section involves the *local union* only. It asserts that such local was a completely separate entity and the actions and duties of such local could not be imputed to the International. In view of the reading given sub-section (e) in the text we need not reach this contenion.

interest of miners and would retard rather than advance the goals of the National Labor policy.[5]

Since we do not find the Union to have breached any duty created by the collective bargaining agreement or by the obligation of fair representation we must conclude that it is without liability to appellants.

Accordingly, the judgment below is affirmed.

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[5]We do not consider the effect of a resolution adopted by the Union which provides as follows:

> Each district representative shall know the Federal Mine Safety Code and be made fully responsible for compliance with its various provisions by the various miners within his assigned jurisdiction.

The text of such resolution, while appearing in an interrogatory was never brought to the attention of the District Court in the complaints, the memoranda or the oral arguments which were presented to that Court. Further, appellants have consistently urged in this Court and below that theirs is an action based on the collective bargaining agreement. Obviously the resolution is not part of such agreement.

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MICHAEL RODAK, JR., CLE

IN THE

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OCTOBER TERM, 1972

No. 72-891

ANNA MAE BRYANT, Administratrix, Etc., et al.,
Petitioners,

v.

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA; DISTRICT NO. 23, UNITED MINE WORKERS OF AMERICA; W. A. BOYLE, PRESIDENT OF INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Petition for a Writ of Certiori to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents, International Union, United Mine Workers of America; District No. 23, United Mine Workers of America; and W. A. Boyle, President of International Union, United Mine Workers of America, hereinafter referred to as respondents, deny petitioners have asserted any ground or grounds to justify the granting of certiorari in this case.

OPINIONS BELOW

The District Court's opinion and order are unreported but are printed in Appendix "A" to the petition. The Sixth Circuit's opinion is unreported but is printed in Appendix "B" to the petition.

JURISDICTION

The United States District Court for the Western District of Kentucky entered judgment on a motion for summary judgment for the defendants in an action based on violation of the Labor Management Relations Act (Appendix "A" to petition). Petitioners' appeal to the Sixth Circuit Court of Appeals was denied and judgment was entered on September 26, 1972 (Appendix "B" to petition).

QUESTION PRESENTED

Whether the courts below, in their findings of fact and conclusions of law, were correct in finding that respondents did not breach any duty created by the collective bargaining agreement or by the obligation of fair representation, and were without liability to petitioners.

STATEMENT

Petitioners base their cause of action on Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, claiming violation of a collective bargaining agreement between decedents' employer and the union of which they were members. Petitioners sued both the employer and the union in the court below. The Sixth Circuit found that language of the complaint could also be viewed as a suit for the union's breach of its duty of fair representation (Petition, pp. 19, 26). The Court held that no evidence showed respondents breached any duty created by the collective bargaining agree-

ment or any duty of fair representation. Respondents assert that both the District Court and the Sixth Circuit were correct in their findings of fact and conclusions of law based on the pleadings, depositions, answers to interrogatories, affidavits and other material contained in the record.

The District Court rejected plaintiffs' claims and granted summary judgment in favor of both the coal company and the union. Plaintiffs have accepted the District Court's decision with respect to the coal company and on appeal contested only that part of the District Court's judgment as denied them relief against the union.

Petitioners' petition states (p. 2) that the question presented is whether a labor union can be liable for wrongful death of a member as a result of negligent performance of its obligation to enforce a union contract. Respondents respectfully submit that petitioners have incorrectly stated the question presented as found by the Sixth Circuit in its opinion. Petitioners, in the Sixth Circuit and in the District Court, urged that their action was based on a collective bargaining agreement. Thus, it is submitted that the question noted in appellees' brief in the Sixth Circuit is the correct question, and it reads as follows:

> "By incorporating the Federal Mine Safety Code, did the Agreement create a cause of action in favor of appellants against the appellees or a basis for recovery in addition to compensation benefits?"

The District Court and the Sixth Circuit answered correctly in the negative and held that petitioners had failed to present an alleged cause of action arising out of a breach of contract against respondents. It is submitted the decision of the Sixth Circuit clearly shows

the reasons why petitioners failed to state a cause of action or show that one existed. The Sixth Circuit did not disregard Rule 56 of the Federal Rules of Civil Procedure concerning reasonable inferences in regard to motion for summary judgment. Petitioners basically failed to state a cause of action and dismissal of their complaint by the Sixth Circuit is compatible with applicable law and national labor policy. Further, the Sixth Circuit's decision does not show any undue consideration for labor unions and the observation of petitioners in that regard certainly does not show a basis in law or in fact for granting the writ it seeks herein.

Since each of the findings had the concurrence of the Sixth Circuit's affirming opinion and the district court, this Court should reject the invitation to review the instant case, implementing its rule that "We do not grant a certiorari to review evidence and discuss specific facts". *United States* v. *Johnston*, 268 U.S. 200, 227.

Petitioners seek to impose a burden upon collective bargaining representatives that would do great violence to national labor policy.

CONCLUSION

For the reasons herein discussed, UMWA submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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